United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original

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In the

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 74-1348

WARNER BROS., INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

BRIEF OF PETITIONERS WARNER BROS., INC. AND COLUMBIA PICTURES INDUSTRIES, INC. AND INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS AND SAMUEL GOLDWYN PRODUCTIONS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission (FCC) acted arbitrarily and capriciously and contrary to the public interest by continuing the prime time access rule (PTAR), despite its own factual findings that the rule over the past three years had defeated its own goals by decreasing innovative and diversified programming, by failing to decrease network dominance, and by creating additional negative effects not present before the rule?

2. Whether PTAR, viewed in the light of three years of actual experience, violates the paramount right of the public to the most diversified and meaningful choice of programs under the First Amendment and the Communications Act because the rule:

(a) admittedly foists upon the public less diverse and less innovative programs -- namely, a repetitive diet of inexpensive merchandise and game shows and some other old network discards;

(b) totally bans during prime time access periods feature motion pictures the public wants;

(c) totally bans during prime time access periods popular independently-produced programs simply because they were once telecast by a network;

(d) burdens the public, particularly children who are heavy viewers during access periods, with a doubling of commercials;

(e) establishes broad categories of preferred programs which are given special access; and

(f) generally involves the FCC deeply in the program selection process to an extent and scope never before attempted or permitted?

3. Whether PTAR violates the standards of Due Process and Equal Protection by giving free access to repetitive game shows, replicas of other old network programs and inexpensive foreign programs, as well as certain preferred programs categories, while totally banning all motion pictures and those independently-created programs which appeared on networks and restricting the presentation of new and diversified programs on networks during access periods?

4. Whether the FCC, in a divided opinion, has violated the Administrative Procedure Act by adopting conclusions refuted by its own factual findings, by making inconsistent conclusions, by disregarding the studies of its experts, and by seeking a compromise to satisfy competing private interests and ignoring the public interest?

Preliminary Statement

Petitioners Warner Bros. Inc. (Warner), Columbia Pictures Industries, Inc. (Columbia) and Intervenors National

Committee of Independent Television Producers (NCITP) and Samuel Goldwyn Productions (Goldwyn) request this Court to set aside the Report and Order of February 6, 1974*, in which a divided FCC decided to continue rather than repeal the prime-time access rule.

Invalidation of PTAR, we submit, is required by the principles established by this Court three years ago in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). There, before the rule had been tested, this Court upheld it by accepting the FCC's predictions that it would probably lead to wider choices of innovative programs for viewers and decrease network dominance. But because the novel and experimental rule involved the FCC in sensitive First Amendment programming matters to an unprecedented extent, this Court (at p. 479) specifically adopted the following rule from Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969):

> "And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."

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* See Joint Appendix of National Association of Independent Television Producers and Distributors, and Westinghouse Broadcasting Co., Inc., in their Petitions for Review before this Court, Case nos. 74-1168 and 74-1263, hereinafter cited as "JA". All paragraph and "Appendix" references herein, unless otherwise indicated, are to the Report and Order released February 6, 1974, FCC 74-80 (Docket 19622).

The time has now come "to reconsider the constitutional implications" of PTAR in light of the FCC's recent Report and Order reviewing three years of operation of the rule. The FCC's own undisputed factual findings -- based largely on industry statistics -- show that PTAR has led to less diverse and less innovative programming (primarily a plethora of repetitive game shows) directly contrary to PTAR's principal goal. The rule has also not achieved its objective of decreasing network dominance. Those undisputed facts do not jibe with the conclusions of a sharply divided FCC to continue PTAR, with a maze of modifications.

Two of the five Commissioners, who participated in the final adoption of the February 6 Report and Order, favored outright repeal; a third was equivocal but opted for continuation of a modified version of the rule because it was "capable of achieving some consensus within the Commission, however fragile".*

That consensus, according to the Commission's own opinion, represented a compromise among competing private interests. Nobody stated that the rule had served the public interest or would do so in the future -- in stark contrast to

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* Report and Order, concurring statement of Commissioner Richard E. Wiley.

the FCC's optimistic predictions four years ago when it originally adopted the rule. And the rule was severely criticized by the FCC's own former General Counsel, by its Communications Economist, by the Office of Telecommunications Policy, and by the nation's leading television critics.

This is thus not the garden-variety case requiring judicial deference to the expertise of an administrative agency trying to predict the future. Indeed, the topsy-turvy setting of the FCC's action is shown by the fact that the vast majority of independent producers -- whose growth and development was the main object of the rule -- now seek its repeal; and two of the three television networks, who were the targets of PTAR, are now its ardent champions.

This is bureaucratic action in a Kafkaesque setting. The rule's intended targets fight to keep it; its intended beneficiaries fight to repeal it. And a split-agency narrowly decides to perpetuate a rule despite its own factual findings that it has injured the public for three years, despite its own unwillingness to venture any more optimistic predictions for the future, and despite pleas for repeal by disinterested experts both within and outside the agency.

The modifications to PTAR now proposed by the Commission do not purport to deal with the basic failings of the rule -- they are not designed to increase program diversity or decrease network dominance. Moreover, these modifications, which were the sine qua non for allowing a continuation of PTAR, create a host of brand-new evils which violate the basic statutory and constitutional obligations of the FCC.

Proceedings Below and Statement of Facts

The Commission adopted PTAR in May 1970 (23 FCC 2d 382) and thereafter denied reconsideration (25 FCC 2d 318). The rule prohibited network affiliated television stations in the top 50 markets from broadcasting more than three hours of network programming during the four hours of prime time each evening (7 to 11 P.M.). It also provided that the hour thus cleared of network programs could not be filled with programs if they had previously been telecast by a network ("off-network" programs) or with feature films that had been telecast in the market within the prior two years. The goals of the rule, as noted above, were to increase program diversity and decrease network dominance.

The Commission acknowledged that this venture into sensitive programming areas represented a breakthrough into a new area of regulation. It was a sharp departure from any prior government regulation of broadcasting because it substantially abridged the freedom of station licensees and viewers to select programs of their choice. It involved the government deeply in the programming process to an unprecedented extent. In view of this and the fact that it was proceeding largely on the basis of predictions as to the rule's probable future impact in the marketplace, the FCC indicated that it would carefully monitor the rule in actual operation and move swiftly if it proved ineffective or produced adverse effects (23 FCC 2d 382, ¶¶ 24, 38, 40).

This Court, as noted above, upheld the rule in Mt. Mansfield. It recognized that while PTAR curtailed First Amendment rights of broadcasters, it would -- if successful -- enhance the more paramount First Amendment rights of the public to a broader diversity of program choices and ideas. As for the critical and contested question whether PTAR would or could in fact succeed in achieving its goals (and therefore justify governmental interference in programming areas), this Court stated that it was then willing to defer to the FCC's predictions and forecasts as to the rule's probable beneficial effects.

(442 F.2d at 483-84) But now that there is an actual track record, this Court must "reconsider the constitutional implications" on the basis of experience rather than predictions. (Red Lion Broadcasting Co. v. FCC, supra, at p. 393.)

As shown by the FCC's own factual findings, three years of experience disproved the FCC's original optimistic predictions. The rule in operation produced substantially less program diversity -- a point nobody really disputes. Access time periods -- generally 7 to 8 P.M. -- suffered from a monotonous diet of game and give-away shows, some repeated five times a week; and these shows generally carried double the number of commercials as had been presented in these time periods prior to PTAR.

Moreover, network dominance -- the second problem sought to be alleviated by PTAR -- increased as a direct result of the rule. As noted above, two of the networks (ABC and NBC) now support PTAR.

Recognizing that the rule was not functioning as predicted, the FCC on October 26, 1972 issued a Notice of Inquiry and Rulemaking (37 FCC 2d 900) requesting comments as to repeal or revisions of PTAR. Massive comments and reply comments were filed in early 1973 by a great number of parties -- producers, stations, networks and others.

The proceeding also evoked responses from disinterested experts. Thus, the Director of the Office of Telecommunications Policy, Executive Office of the President, wrote the FCC as follows based on an exhaustive study of the industry:*

> "The data that we have collected indicate that the effects of prime-time rule, like the effects of reruns, limit the amount of diverse, original, and high-quality programming available in prime time to the American public. Its effects also weaken the program production industry, contrary to the rule's basic objectives. The rule was intended to stimulate new programming markets, encourage independent sources of program production, and create more program diversity in prime-time TV than the networks were providing. There are enough anticompetitive forces at work in TV without the Government adding more. Therefore, we also recommend that the prime-time rule be changed to allow the networks to program on a regular basis in the 7:30-8:00 p.m. time period beginning this fall."

Similarly, the Commission's Communication's Economist, Dr. Alan Pearce, made a comprehensive 167-page study of the economic consequences of PTAR, which is reproduced in our Appendix II. Among other things he concluded:

> "Overall network power has been strengthened, not weakened by the prime-time access rule. (A 167)
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> * * *
>
> [I]nexpensive programs with ratings track records have been dominant, and most of them are easily replicated old network series. (A 170)

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* A 157. References to "A", followed by the appropriate page, are to the Appendix filed simultaneously herewith.

* * *

> The rule has led to more imported foreign programming in the American television market, and there is strong evidence to support the view that this trend is going to continue in the years ahead. (A 173)

* * *

> [P]ublic affairs/documentary . . . has almost totally disappeared from the prime-time schedules between the hours of 8 to 11 p.m. as a result of the prime-time access rule . . . (A 174)

It is ironic that the FCC, which did not conduct its own economic study when adopting PTAR (25 F.C.C.2d 318, 320), ordered such a study in this proceeding but now ignores it.

Despite these comprehensive studies by disinterested experts, the Commission decided to continue PTAR, with certain revisions. The formal Report and Order was adopted January 23, 1974. At that time, there were only five members on the Commission. Then Chairman Burch stated in a separate opinion: "I believe the prime time access rule should be repealed. It has failed to achieve any of its objectives, whether explicit, implicit or subliminal." Similarly, Commissioner Reid stated: "Based upon the evidence before us, I believe that the total repeal of the rule would have been much more in the public interest." And Commissioner (now Chairman) Wiley concurred, "quite frankly because it [the opinion] was capable of achieving some consensus within the Commission, however fragile". The Report and Order itself (¶ 82) concedes that it is a compromise to satisfy competing vested interests.

The nature of the FCC's action was recently described by John W. Pettit, who resigned as General Counsel to the Commission on March 11, 1974. A Broadcasting article* reports as follows about his remarks to an industry association on March 12:

> "'One thing I can say now,' he observed, 'is about the prime-time access decision. It was a compromise, pure and simple. The FCC members had no idea of how it would function when everybody

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* March 18, 1974, pp. 47-8.

voted for it at first. They didn't know what they were doing. That agency can get itself into very delicate situations.'

"Mr. Pettit asserted the recent revision of the prime-time access rule is 'a dangerous, dangerous precedent' which 'puts the government in the position of using its judgment concerning the quality of programing.'

"The revision, now before the U.S. Court of Appeals for the Second Circuit of New York, 'spells trouble for everyone, including the public,' Mr. Pettit said. 'The commission started out with all good ends in minds, and ended up with infringements of the First Amendment. It bothers me.'"

Comparison of the Original and Revised Rules

(1) Limitation on Network Programming - As noted above, the original rule provided that network affiliates in the top 50 markets could not broadcast more than three hours of network programs in the four hours of prime time (7-11 P.M.) Prior thereto, the networks had been programming only three and one-half hours of prime time on Monday-Saturday (7:30-11 P.M.) and four hours on Sundays (7-11 P.M.) After adoption of the rule, the three networks all ultimately decided to stop programming 7:30-8 P.M. on Monday-Saturday and 7-7:30 P.M. and 10:30-11 P.M. on Sundays. Thus, the time slots of 7-8 P.M. on weekdays and 7-7:30 P.M. and 10:30-11 P.M. on Sundays became so-called "access time."

The revised rule now eliminates PTAR on Sunday and specifies that the "access time" restrictions on Monday-Saturday shall apply only to the 7:30-8 P.M. period. Although this exempts the 7-7:30 P.M. time period, the networks were not generally programming in this time period before the rule and have announced no intention of doing so now.*

(2) Feature Films - The original rule allowed the broadcast of feature films during access time periods provided that they had not been telecast in the market within the prior two years. In contrast, the revised rule flatly bans all broadcasts of feature films in access time.

(3) Off-Network Programs - Both the original and revised rules also ban the use in access time periods of independently-produced programs previously telecast on a network. But, as noted below, the rule in practice encourages the production of new episodes of games and other shows with long prior network histories.

(4) Program Exceptions - The revised rule, unlike the original, contains a series of special exceptions for various classes of programs -- including inter alia certain

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* Some affiliates do carry network news from 7 to 7:30 pursuant to an FCC waiver.

sports events, other undefined "network specials", documentaries, public affairs and children's programs. The Commission was unwilling to allow PTAR to continue without these artificial rules apparently designed to stimulate programs which PTAR could not.

In summary, from 7:30 to 8 P.M. PTAR now bans all movies and all off-network programs and also prohibits network programs unless they fit within one of the exceptions specified by the Commission.

Stay Petition and Expedited Appeal

On December 16, 1973 and again on February 8, 1974, the National Association of Independent Television Producers and Directors (NAITPD), a small group of producers and distributors specializing primarily in game shows, requested the FCC to defer the effective date of the modified PTAR until the fall of 1975 and to retain the old rule. The Commission denied those requests (¶¶ 113-16; and Memorandum Opinion and Order of March 6, 1974, FCC 74-221, JA 180-183).

On February 7 and 28, 1974, respectively, NAITPD and Westinghouse Broadcasting Company, Inc. (Westinghouse), the inventor of the PTAR concept, filed Petitions for Review of the FCC's Report and Order. And on February 28 they made motions before this Court for an order staying the effective

date of the revised PTAR until the fall of 1975. Warner and Columbia intervened to oppose a one-year continuation of PTAR. This Court denied the stay motions on March 12 and scheduled expedited appeals. Warner and Columbia then filed petitions for review to invalidate PTAR in its entirety and, by order of this Court dated March 21, 1974, were permitted to join in the expedited schedule. NCITP and Goldwyn intervened in the Warner and Columbia appeals in order to seek repeal of the entire rule.

The Parties

(1) Petitioners Warner and Columbia produce and distribute television programs and motion pictures. Intervenor Goldwyn operates a film studio for rental to independent producers of television programs and motion pictures. Intervenor NCITP is a group of more than 75 independent television producers* who, unlike Warner and Columbia, lack their own studios or production facilities or distribution organizations. Their members, covering a broad range of creative talents, have produced many of television's most successful programs, including All in The Family, Sanford & Son, The Waltons, Hallmark Hall of Fame, The FBI and The Mary Tyler Moore Show. These petitioners

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* These producers are listed at A 151-54.

and intervenors all opposed PTAR in the recent rule-making proceedings and sought total repeal of the rule.

They are engaged in the creation of high-quality dramatic and comedy programs which utilize top talent and entail substantial other production in-puts, with budgets exceeding $100,000 per half-hour episode. In contrast, game shows are produced for as little as $5,000 or $10,000. PTAR has, and by its very nature must continue to have, a significantly adverse impact on the production of more costly programming by independent producers because it reduces the availability of the network distribution system necessary to support these expensive programs which the public wants; it constricts the "after market" for syndication of such programs to local stations after their network runs; and it severely restricts the opportunity to license feature films. Indeed, NBC -- which now supports PTAR -- previously estimated before the Commission that the difference between programming produced for network distribution and access-type shows deprived the public of approximately $60 million worth of domestic television programming.*

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* See NBC's Principal Comments before FCC, January 15, 1973, p. 3; Appendix D, p. 1.

(2) Petitioner NAITPD (Case No. 74-1168), which seeks to upset the revised rule and reinstate the original rule, represents thirteen television producers and distributors.* It is primarily a spokesman for game show entrepeneurs.** The game shows produced and/or distributed by its members occupied almost 44% of all access half-hour periods devoted to syndicated entertainment programs last year.***

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* In contrast, almost 100 independent producers sought repeal of PTAR before the FCC. This included the members of NCITP and other independent producers, such as Jack Wrather Productions, Warner, MCA, Screen Gems, Twentieth-Century Fox, MGM, Paramount, GE Tomorrow Productions, and Hughes Sports Network.

** NAITPD's thirteen members, disclosed in Appendix H to its Petition for a Stay in this Court, include the following producers and distributors of replicated network game shows: Goodson-Todman (To Tell the Truth, New Price is Right, Beat the Clock and I've Got a Secret); Viacom (The Price is Right and What's My Line?); Jim Victory (Concentration); Worldvision (Let's Make a Deal and It Pays to be Ignorant); Metromedia (Truth or Consequences and Jeopardy); Filmways (Hollywood Squares); Firestone (To Tell the Truth, The New Beat the Clock, The New Candid Camera, and I've Got a Secret). See Broadcasting, Feb. 18, 1974, pp. 33-38.

*** See chart following page 23, infra. These statistics are derived from the basic research data underlying the Joint Appendix filed before the Commission by Warner, Columbia, MCA and Paramount, A 121. The Commission's present Opinion (¶ 92; Appendix C) regards this research data as the most reliable statistical evidence in the record.

NAITPD's Executive Chairman is also Executive Vice President of Goodson-Todman, whose offices and telephone number NAITPD shares.* Goodson-Todman's game shows fill nearly 25% of all access time devoted to syndicated programs -- a far larger share of the market than any producer has ever enjoyed in this time period.**

(3) Petitioner Westinghouse (Case No. 74-1283) also seeks a return to the old PTAR, which it conceived. Westinghouse is, among other things, the nation's largest affiliated television station owner, next to the networks themselves, with stations in five of the top markets.*** Westinghouse originally predicted the PTAR would lead to

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* See NAITPD Petition for Stay in this Court, Ex. H.

** A 56. Goodson-Todman is generally recognized as one of the principal beneficiaries of PTAR. (See Wall Street Journal, November 24, 1972, p. 1, TV Guide, January 27, 1973, p. 8.

*** Boston, Philadelphia, San Francisco, Baltimore and Pittsburgh.

new and diverse programs for access periods. After passage of the rule, Westinghouse initially produced some new shows (not games) for first-run syndication in access time periods. But they ran almost exclusively on its own stations. Other stations preferred games and inexpensive foreign shows. Because the syndication market would not -- indeed, could not -- support its type of syndication programs, Westinghouse abandoned production.*

In Mt.Mansfield, this Court cited Westinghouse's promise that it could "produce a first run dramatic series of prime time quality" for access periods. (442 F.2d at page 483) Westinghouse epitomizes the arbitrary and capricious nature of the rule. If Westinghouse could not make a success of producing new access shows, despite its unique advantages (five captive stations, substantial production facilities, and vast resources), who can? It is ironic that Westinghouse now continues to fight for a rule which cannot support its own production of new access shows. Its pleadings before this Court do not even mention its original program promises or abandoned production activities.

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* A 53-54.

I.

THE FCC DECISION TO CONTINUE PTAR IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE PUBLIC INTEREST BECAUSE THE RULE HAS FRUSTRATED ITS GOAL OF PROMOTING PROGRAM DIVERSITY

As this Court noted in Mt. Mansfield, one of the primary goals which the FCC predicted for PTAR was an increase of the amount of diverse and innovative programming for the American public (442 F.2d at pp. 477-78). But the Commission's present findings (¶¶ 79, 80, 92 and Appendix C) show that these predictions did not bear fruit. On the contrary, the FCC finds that PTAR has led to less diversity and less innovation. And the Commission now refuses to predict, as it did four years ago, that PTAR will stimulate diversity and innovation in the future. Yet, it inexplicably decided, by a split vote, to continue the rule. That is arbitrary and capricious in the extreme and is clearly contrary to the public interest.

The Record of Three Years of Access Programs

Instead of stimulating imaginative and fresh ideas, the FCC finds that PTAR has produced "singularly little in the way of opportunity for the development of really new syndicated material" (¶ 79), but instead has subjected the public to "a great deal of material [which] is revivals or continuations

of [former] network series, or, in the case of some successful game shows such as Let's Make A Deal, The Price is Right and Hollywood Squares, 'sixth episodes' of programs currently stripped on the networks on weekdays" (Appendix C, p. 3). (A "stripped program" is one which is broadcast five days a week.)

The FCC finds that game and give-away merchandise shows during access time increased from 11% to 55% -- whereas varied dramatic programs declined from 46% to 12% and diversified comedy programs declined from 22% to 7% (Appendix C, p. 2).

According to the Commission, access shows over the past three years:

> ". . . can hardly be called distinguished, and there are certain developments which unquestionably are, as they should be, grounds for concern, and will be grounds for much greater concern if the picture, three years from now, is generally the same. These include such matters as a marked increated in the stripping of programs (generally game shows) in the 7:30 period (compared to the variety of network material presented then in 1970 and before), and the increased use of foreign product, which -- while it should not be prohibited or seriously discouraged -- nonetheless cannot be regarded as a favorable result of the rule, since it means less use of U.S. material (and thus U.S.

> production activity and employment) and also likely these programs do not have the same overall potential for 'relevance' as do programs produced here (dealing with current American themes and problems, etc.) Also, the greatly increased use of game shows itself can hardly be regarded as a favorable result of the rule, not necessarily as such but in view of the extent that these are either stripped in prime time or represent 'sixth episodes' of game shows made for network daytime stripping. There has been a corresponding decline in other categories of programming, such as drama, and much of what there is is foreign product (in 1972-73 75% of dramatic-program time in the access period was devoted to foreign programs; the figure is considerably higher this year because of the demise of the Young Dr. Kildare series)." (¶ 92 footnotes omitted)

The FCC also found -- contrary to its original forecasts of increased diversity -- that there had been a sharp rise in the use of stripped game programs as a result of the rule (Appendix C, pp. 5-6). The increase of stripping since the passage of the rule has been from 20 to 56 game shows between 7-7:30 P.M. and from 0 to 34 game shows between 7:30-8 P.M. (Appendix C, pp. 5-6). When the networks were presenting programs 7:30-8 P.M., no show appeared more than once a week.

The Commission expressed particular alarm about the fact that viewers in many markets are limited exclusively or primarily to game shows in many time periods:

> "This is particularly true in situations where a station strips Mondays through Fridays two game shows, one at 7 and one at 7:30, and in markets where all three affiliated stations strip game shows at the same time," (¶ 92, n. 40)

* * *

> "In 1973, in four markets all three affiliated stations were stripping game shows opposite the others in one of the half-hours; in two other markets, there were two stripped game shows opposite each other on affiliated stations in both half-hours; and in 17 other markets there were two game shows on affiliated stations at the same time." (Appendix C, p. 6)

In short, the PTAR has, by the Commission's own admissions, led to sameness and uniformity for viewers rather than increased diversity, innovation and choice.

The nation's TV critics have also decried this shoddy treatment of the public, particularly children and other family viewers in the early evening time periods covered by PTAR.

> "That slot [access time] has been monopolized by inane game shows and penny-budget disasters." (N.Y. Times, 9/14/72)

* * *

> "Instead of promoting original programming, it has sent the local station managers scurrying to producers who imitate hits of the past. Instead of promoting TV productions round the country, it has been a

bcon to Canadian and British producers..." (Time, 2/5/73)

* * *

"A season and a half later, the rule has become a regulatory quagmire, almost wholly counterproductive as a creative stimulant, highly discriminatory in its industry impact, and hopelessly inflexible as a guideline. Specifically, it has led to an appalling proliferation of cheaply produced game shows and revivals of long-gone network attractions," (TV Guide, 1/27/73, p. 6)

* * *

"'Hee Haw.' 'What's My Line?' "This is Your Life.' 'Lawrence Welk.' 'To Tell The Truth.' That sounds like a list of television hits of yesteryear. It is. It is also a list of television hits of today, thanks to (some say by order of) the Federal Communications Commission." (Wall Street Journal, 11/24/72, p. 1)

In order to give an in-depth and descriptive picture of access shows, we attach hereto a chart which lists last season's top 24 access-time shows. Those programs accounted for more than 86% of all access time devoted to syndicated programs.* The chart demonstrates the lack of diversity and innovation which characterize access fare and

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* This chart, which appeared in Warner's Principal Comments before the FCC (A8-12), was not challenged in the reply comments of PTAR's proponents.

TOP ACCESS SHOWS 1972-1973

RANK	TITLE	% OF TOTAL ACCESS 1/2 HOURS OF SYNDICATED ENTERTAINMENT PROGRAMMING*	% OF CLEARANCE IN TOP 50 MARKETS**	AVAILABLE BEFORE PTAR	DESCRIPTION AND PRODUCER	YEARS OF PRIOR TELEVISION EXPOSURE		APPROX. NO. OF BROADCASTS WITHOUT '73 ACCESS PERIODS
1	TO TELL THE TRUTH	12.1%	70%	YES	Game show (Goodson-Todman)	CBS daytime strip CBS nighttime weekly	15.3	1650
2	TRUTH OR CONSEQUENCES	12.0	68	YES	Game show (Ralph Edwards)	CBS nighttime weekly NBC daytime strip NBC nighttime weekly Syndication strip	18.1	3950
3	WHAT'S MY LINE	6.7	42	YES	Game show (Goodson-Todman)	CBS nighttime weekly Syndication strip	20.4	1730
4	HEE HAW	4.8	70	YES	Variety show (Youngstreet)	CBS nighttime weekly	1.6	73
5	LAWRENCE WELK	4.6	66	YES	Variety show (Telekew)	ABC nighttime weekly Local (LA) night-time weekly	20.5	925
6	UFO	4.5	70	NO	Adventure program (ATV)	British television network		-
7	LET'S MAKE A DEAL	3.5	94	YES	Game show (Hatos-Hall)	ABC daytime strip (still running) ABC nighttime weekly NBC daytime strip NBC nighttime weekly	11.8	2390

* A 104

** A 105

TOP ACCESS SHOWS 1972-1973

RANK	TITLE	% OF TOTAL ACCESS 1/2 HOURS OF SYNDICATED ENTERTAINMENT PROGRAMMING*	% OF CLEARANCE IN TOP 50 MARKETS**	AVAILABLE BEFORE PTAR	DESCRIPTION AND PRODUCER	YEARS OF PRIOR TELEVISION EXPOSURE	APPROX. NO. OF BROADCASTS WITHOUT '73 ACCESS PERIODS
7	HOLLYWOOD SQUARES	3.5	96	YES	Game show (Heatter-Quigley)	NBC daytime strip (still on network) NBC nighttime weekly 6.6	1530
9	PARENT GAME (Spin-off of five similar game shows)	3.3	92	YES	Game show (Chuck Barris)	Dating Game ABC daytime strip (still on network) ABC nighttime weekly Newlywed Game ABC daytime strip (still on network) ABC nighttime weekly Family Game ABC daytime strip Game Game Syndication strip How's Your Mother-In-Law? ABC daytime strip 23.0	4020
10	WILD KINGDOM	3.0	82	YES	Animal show (Don Meier)	NBC nighttime weekly Syndication weekly 9.3	240
11	THE PROTECTORS	2.8	78	NO	Adventure program (ATV-Brut)	British network television	-

* A 104

** A 105

TOP ACCESS SHOWS 1972-1973

RANK	TITLE	% OF TOTAL ACCESS 1/2 HOURS OF SYNDICATED ENTERTAINMENT PROGRAMMING*	% OF CLEARANCE IN TOP 50 MARKETS**	AVAILABLE BEFORE PTAR	DESCRIPTION AND PRODUCER	YEARS OF PRIOR TELEVISION EXPOSURE		APPROX. NO. OF BROADCASTS WITHOUT '73 ACCESS PERIODS
12	CIRCUS	2.7	74	YES	Variety show (Cates-20th Fox)	Spin-off of "International Show Time" NBC nighttime weekly	4.0	200
13	NEW PRICE IS RIGHT	2.5	70	YES	Game show (Goodson-Todman)	NBC daytime strip NBC nighttime weekly ABC daytime strip ABC nighttime weekly CBS daytime strip (still running)	16.2	2660
14	YOUNG DR. KILDARE	2.3	64	YES	Dramatic show (MGM)	Remake of Dr. Kildare NBC nighttime once weekly NBC nighttime twice weekly Syndication strip	11.0	300 550+reruns
15	WAIT TILL/HOME	2.2	62	YES	Cartoon (Hanna-Barbera)	ABC-original segment of cartoon program	-	1
16	POLICE SURGEON	2.2	60	NO	Dramatic program (Four Star-CTV)	Canadian television network	-	-
17	BEAT THE CLOCK	1.9	12	YES	Game show (Goodson-Todman)	CBS nighttime weekly ABC daytime strip Syndication strip	15.00	2045

* A 104

** A 105

TOP ACCESS SHOWS 1972-1973

RANK	TITLE	% OF TOTAL ACCESS 1/2 HOURS OF SYNDICATED ENTERTAINMENT PROGRAMMING*	% OF CLEARANCE IN TOP 50 MARKETS**	AVAILABLE BEFORE PTAR	DESCRIPTION AND PRODUCER	YEARS OF PRIOR TELEVISION EXPOSURE		APPROX. NO. OF BROADCASTS WITHOUT '73 ACCESS PERIODS
18	MERV GRIFFIN	1.7	6	YES	Variety show (Griffin-MPC)	Westinghouse syndication strip CBS nighttime strip Metromedia syndication strip	7.3	1785
18	I'VE GOT A SECRET	1.7	48	YES	Game show (Goodson-Todman)	CBS nighttime weekly	15.0	750
20	THIS IS YOUR LIFE	1.7	46	YES	Game show (Ralph Edwards)	NBC nighttime weekly Syndication nighttime weekly	11.0	550
21	AMAZING WORLD OF KRESKIN	1.4	40	NO	Audience participation (Bushell-Viacom)	Canadian network	-	-
22	ADVENTURER, THE	1.4	38	NO	Adventure program (ATV-Brut)	British network television	-	-

* A 104

** A 105

TOP ACCESS SHOWS 1972-1973

RANK	TITLE	% OF TOTAL ACCESS 1/2 HOURS OF SYNDICATED ENTERTAINMENT PROGRAMMING*	% OF CLEARANCE IN TOP 50 MARKETS**	AVAILABLE BEFORE PTAR	DESCRIPTION AND PRODUCER	YEARS OF PRIOR TELEVISION EXPOSURE		APPROX. NO. OF BROADCASTS WITHOUT '73 ACCESS PERIODS
22	MOUSE FACTORY (Spin-off of five similar series)	1.4	38	YES	Cartoon/ children's variety (Walt Disney)	Disneyland ABC nighttime weekly Walt Disney Presents ABC nighttime weekly Walt Disney's Adventure Time ABC nighttime weekly The Mickey Mouse Club ABC nighttime strip Syndication day and nighttime strip Wonderful World of Disney NBC nighttime weekly	24.05	4865+reruns
4	LASSIE	1.2	32	YES	Animal show (Wrather)	CBS nighttime weekly Syndication day and nighttime weekly	29.0	1450+reruns
4	HALF GEORGE KIRBY HOUR	1.2	32	NO	Variety/ comedy (Winter/ Rosen-CTV)	Originated from one-hour network special		1

* A 104

** A 105

the many years of prior television use of these program formats.

In addition to failing to stimulate a wider choice of diverse and innovative programs, PTAR has -- as the Commission itself concedes (¶ 95) -- failed in its prediction of creating a larger number of independent producers. Indeed, as shown in the foregoing chart, the top access shows come from preexisting producers who were making shows for the networks and syndication for many years. The effect of the rule, as demonstrated by that chart, is to concentrate 50% of syndicated access time in the hands of three suppliers -- Goodson-Todman (25% - games), Ralph Edwards (14% - games), and ATV (9% - foreign off-network). Such a small number of producers never before had such a high degree of concentration in these time periods. This clearly flouts the Commission's original prediction for PTAR.

PTAR, as the Commission concedes (Appendix C, p. 3), has also led to a sharp increase in foreign programs from virtually zero prior to the rule to over 20% of all entertainment programs in access time and to 75% of all dramatic access fare (¶ 92). These programs -- inexpensive for U.S. stations since they have recouped their costs abroad -- generally do not deal with themes relevant to American social issues (¶ 92). And they aggravate the unemployment and

economic problems of the U,S, production industry (ibid.) -- a result contrary to PTAR's goal of stimulating the independent production industry.

Finally, PTAR has great accelerated commercialization. Most stations have doubled the number of commercial minutes in access time, with the impact falling most heavily on children and early evening family viewers.*

The Future For Access Programming Under PTAR

The past three years of access programming are a certain harbinger for the future. There is no evidence to support any notion that in the future stations will not continue, in the Commission's words, "to prefer cheaper material such as inexpensive U.S. game shows ... or foreign 'off-foreign network' product also available relatively cheaply." (¶ 90)** Indeed, the economic imperatives of PTAR will

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* The Commission, by way of explanation, asserts that the PTAR has increased the opportunity for local advertisers to present more commercials (¶ 100; also see ¶ 32(4)). But the Commission's principal obligation is to the viewing public -- and that obligation is not met by a double dose of commercials. A 21.

** Indeed, after three years of access shows, the Commission is able to find just two series which it regards as possible hopeful signs for the future -- "Dusty's Trail" and "Ozzie's Girls" (¶ 90). But the first of those programs has been abandoned after just one season (Broadcasting, February 18, 1974, p. 30); and the future of the second show appears uncertain (NAITPD Petition for Stay before this Court. Appendices L, M).

necessarily lead to more of this type of programming -- as proved by three years of actual experience.

Stations and those producers who still make access shows have opted for the least expensive fare -- namely, game shows which cost $5,000-$10,000 to produce or foreign programs that have recouped their costs abroad. Station-by-station sales under PTAR have not supported, and cannot support, the vastly larger investments required for network quality shows because the access method of distribution involves multiple sales efforts, lower station clearances, lesser advertising revenues, and greater distribution expenses.

In contrast, as the FCC recognized (23 FCC2d 382, 386-87), the network process of distribution entails a single sale, a national audience and greater advertising revenues. This can support -- and indeed commands -- the more expensive and higher quality dramatic, comedy and other types of programs which the public wants. Those programs, because they utilize the top creative talent and other substantial production elements, are necessarily expensive and cannot be sustained by station-by-station distribution under PTAR.

In short, the economics of the PTAR syndication process have dictated -- and will continue to dictate -- the proliferation

of cheap programs in time periods during which the public used to be able to see network-quality programs; and this has resulted in the explosively adverse reaction of the nation's television critics to access fare.

Those fundamental economic principles were fully documented in the exhaustive economic report of the Commission's own Communications Economist.* Though the Commission did not specify that only the old network game shows or foreign imports are allowable in access time, it created a structure which had precisely the same chilling effect.

Ignoring these basic economic facts, the FCC concludes that it will continue PTAR because the rule has not had a sufficient test "at least in the sense that the somewhat mediocre showing so far can be regarded as showing that nothing different is to be expected in the future." (¶ 89) But that qualified conclusion is not supported by anything in the record or by any factual findings. On the contrary, the record before the Commission disclosed three years of access programming (1971-72, 1972-73, and 1973-74).**

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* A 174-75, 233-35, 276-80.

** A television season runs from the fall of one year to the next so that the Commission had the full benefit of what amounted to three seasons of access programming. Indeed, the Commission itself (Appendix C) acknowledges this when it sets forth a chart comparing programming in the season before PTAR (1970) and in the following three seasons.

The Commission seeks to dismiss the first year (1971-72) by the conclusion that it was "'a different ball game' in that off-network material and all feature films could be used." (¶ 89) But a statistical study, which the Commission endorses throughout its Opinion (e.g., ¶ 92 and Appendix C), shows that 77% of access time in the first year was programmed just as if the off-network and movie aspects of the rule had been in full operation at that time.*

Moreover, in the following two years (1972-73 and 1973-74), when the off-network and movie rules were officially in effect, the trend of repetitive access shows grew even worse. For example, the percentage of access time occupied by game shows steadily accelerated:**

1970-71 (pre-PTAR)	11%
1971-72	23%
1972-73	49%
1973-74	55%

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*A 8-12.

**A 114; Appendix C, p. 2.

In light of the past three years of access show, the Commission refuses to predict -- as it did in 1970 (23 FCC2d 382, ¶¶ 24, 37; 25 FCC2d 318, ¶¶ 15, 17, 27) -- that PTAR will lead to diversified and innovative programs in the future. Instead, the FCC concedes (¶ 90) that station choices of "cheaper material" such as games and foreign shows "[u]ndeniably ... may be long-term factors"; but that does not "demonstrate conclusively that these are, or will forever be .... iron-clad limitations"; and that there is always the "possibility ... that stations may be persuaded ... to pay prices higher than those they are now paying." Id. (emphasis added) But such weak conjecture -- couched in the most tentative terms and not supported by any factual findings, evidence or rational explanation -- can hardly justify continuing a rule which has inflicted such great injury on the public for the past three years.

In contrast to its refusal to make predictions now, the Commission in 1970 forecast "that substantial benefit to the public interest in television broadcast service will flow from opening up evening time so that producers of television programs may have the opportunity to develop their full economic and creative potential";* "we are convinced that American commerce and industry will support greater diversity of programs".**

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* 25 FCC2d 318, ¶ 17.

** 23 FCC2d 382, ¶ 36.

But now the Commission avoids such predictions, perhaps because it was let down by the 15 producers who promised in 1970 that they would supply diverse and innovative programs if PTAR were passed -- promises on which the FCC (25 FCC2d 318, ¶ 10, n.6) and, in turn, this Court in Mt. Mansfield (442 F.2d at 483) placed great reliance. Most of the 15 producers made no access shows and did not even bother to file comments in the proceedings to review PTAR. The others did not keep their promises.

1. Westinghouse originally produced some non-game programs but has now abandoned production for PTAR.*

2. Goodson-Todman, NAITPD's principal sponsor, originally promised to produce "additional program series including but not limited to game and panel shows." (A 159) But since then, it has produced only revivals of old network game shows.

3. Firestone, another NAITPD member, originally promised that it would offer "excellent and diverse programming of network quality" for access time. (A 160) But it has merely continued to distribute the same old game shows.

4. Metromedia, another NAITPD member, which owns six stations in the largest markets and substantial production facilities, originally promised a plethora of new access shows.

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* A 53-4; Appendix D, p. 11.

But it produced one non-game show in the first access year (Primus); none in the second year; and one in the third year (Dusty's Trail), which is now being abandoned.* In the meantime, Metromedia continued to syndicate the old game show Truth or Consequences which occupies more access time than any other program except another old game show (To Tell The Truth).**

In short, in view of this record of broken promises and three years of PTAR experience, the FCC is not even willing to venture a prediction that the modified rule will lead to a greater diversity of programs or sources. That fact, alone, we submit, totally undermines the FCC's decision to continue the rule. That decision is arbitrary and capricious and, as shown below, violates basic Constitutional principles and the requirements for administrative agency action under the Administrative Procedure Act.

In adopting PTAR in 1970, the Commission stated (23 FCC2d 382, ¶ 24):

> "The likelihood that independent production will succeed is sufficiently great, in our judgment, that it should be given an opportunity. The rule can readily be changed or rescinded if it fails to achieve its purpose."

Now, four years later, the Commission has apparently forgotten that commitment.

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* Broadcasting, February 18, 1974, p. 30

** See chart supra, p. 24.

II.

THE FCC DECISION TO CONTINUE PTAR IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE PUBLIC INTEREST BECAUSE THE RULE HAS FRUSTRATED ITS GOAL OF DECREASING NETWORK DOMINANCE

As this Court noted in Mt. Mansfield (442 F.2d at p. 477), the other primary goal predicted by the FCC for PTAR -- a decrease in network dominance -- has also been thwarted by actual experience under the rule. Thus two of the three networks (ABC and NBC) now support PTAR. This increase in network dominance as a result of the rule takes place both in prime time scheduled by the networks (8-11 P.M.) and in the access time periods (7:30-8 P.M.).

Increased Network Dominance in Prime Time (8 to 11 P.M.)

By shrinking the network prime-time market to three hours a night, PTAR created an artificial scarcity and thereby increased the networks' leverage in that crucial time period over independent program suppliers, stations and advertisers.*

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* A 167-68, 203-04, Forbes, February 1, 1973, p. 50; Variety, February 7, 1973, p. 56. The Forbes article states that the PTAR has reduced the network market for advertisers "when demand was rising" so that "even the poorer shows sold better." Billings of the three increased substantially after the PTAR despite reduced network schedules. (A63-3)

And this increased power has taken place in a triopoly market which the Commission and this Court in Mt. Mansfield condemned as unhealthy and anti-competitive.

The Commission shrugs off concern about the increased network power stemming from the artificial scarcity of network prime time as follows:

> "This must be regarded as somewhat speculative, in view of the strong degree of dominance inherent in the networks' position, as long as they are three sellers on the one hand, as against hundreds of potential national advertiser customers, and three buyers on the other hand facing more than 100 producer-sellers." (¶ 97)

In other words, the Commission concludes that because the networks are already so dominant, any increased power flowing from PTAR is not cause for concern. That conclusion is particularly arbitrary and capricious, in view of the fact that PTAR was passed to decrease network dominance.

Moreover, the Commission's Opinion (¶ 97) totally ignores the undisputed fact that PTAR, by shrinking network

schedules, has also caused a sharp decrease in preemptions of network programming by station licensees. Thus, ABC conceded in its comments before the Commission that PTAR enhanced its power to obtain "better clearances" from affiliates. (p. 18) Peninsula, an ABC affiliate, stated in its comments that "prior to adoption of the PTA rule, [it] regularly pre-empted the network in prime time", but that "[u]nder the rule it has virtually ended such preemptions" (p. 21, n. 7); that it "has attempted to reduce to an absolute minimum the number of network preemptions out of a sense of loyalty to the network" (p. 22); and that "clearance of network time by affiliates, not only by ABC affiliates, has been increased under operation of the prime time rule, perhaps out of the same sense of loyalty to network operation that motivates Peninsula." (p. 23, n. 8) Similarly, a Variety article, cited to the FCC,* reported that in 1973 "the networks are getting better clearances for every program in prime time than they did before the access rule" (February 7, 1973, p. 56).

This was all predictable. Indeed, ABC told the FCC in 1970 that "[h]igher clearance levels . . . can be expected" and that PTAR "may offer the benefits of option time . . ."**

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* A 60.

** ABC Petition for Reconsideration, June 12, 1970, p. 6.

It is ironic in the extreme that the Commission first outlawed option time as anti-competitive and contrary to the public interest (34 FCC 1103); that, when the ban on option time proved ineffective, the FCC passed PTAR in order to decrease network dominance over affiliates; that the rule has made affiliates more reluctant than ever to preempt network fare; and that even though the foregoing undisputed facts were presented to the Commission,* they were ignored in its Opinion.

Increased Network Dominance in Access Time (7:30-8 P.M.)

Overlooking the admitted increase in network dominance in the crucial three hours of prime time (8-11 P.M.), the Commission claims that there is less network dominance in the one-half hour of access time (7:30-8 P.M.) in which station may no longer elect to telecast network programs. (¶ 93)

But the undisputed record refutes that conclusion. The networks each own and operate five stations ("O&O stations") located in the nation's very largest markets, which, as shown below, account for approximately 50% of national revenues for syndicated programs. They thus play the decisive role with respect to the creation of new access programs. For example, Metromedia, an NAITPD member, told the Commission that "an advertiser will not be interested in contracting for a program

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* A 60-2.

unless he is assured of coverage of the major markets"; this creates "the necessity for contracting with a group of network owned-and-operated stations for coverage in the nation's three largest cities"; and thus "there must first be a network O & O group deal, and this must be followed by concentrated sales activities in stations throughout the country."*

Indeed, five of the six new access shows last year were made possible only because of prior commitments and/or financings from network O & O groups.**

The Commission seeks to minimize the dominant role of the network O & O stations in the creation of new access shows by concluding:

> "It is true that the role of the owned stations in the success of access-period material is considerable, but this appears to be somewhat less true now, when these stations are buying somewhat less as a group." (¶ 97)

That conclusion, expressed in the most tentative language, is not supported by the record. The Commission's Economist concludes that "a program stands little chance of being successful in syndication unless the networks' five owned and operated stations buy it." (A 169)

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* Metromedia's Principal Comments before FCC, January 15, 1973, Appendix V, p. 2.

** A 32 .

Similarly, NAITPD told this Court in its Stay Petition:

> "[T]he primary sale for any new [access] show is to network owned and operated stations (O & O's), which account for almost half the expected gross revenue of an access show. In effect, they underwrite the costs, and profits do not even begin until some time later." (p. 14)

And, a recent article in Broadcasting (2/18/74), entitled "Three Men With the Muscle in Prime-Time Access", describes the leverage exerted by the network O & O's station groups over access programs:

> "A buy by a network O & O group, it is said, will virtually assure enough other sales to make a series a success, while failure to get onto an O & O may be considered a short-cut to failure elsewhere." (p. 27)

In summary, during the three hours of network prime time (8-11 P.M.), PTAR has concededly increased network dominance; and in the access half-hour (7:30-8 P.M.), decisions as to the purchase of programming have simply shifted from one network company executive to another. Network dominance and market leverage have increased. PTAR has thus defeated the second of its two primary objectives -- namely, decreasing network power.

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* Further evidence of the decisive role of the O & O's is provided in the affidavits attached to NAITPD's Petition for a Stay, including those of Firestone (App. J) and Filmways (App. L).

Former Chairman Burch, in his separate statement in connection with the current Report and Order, recognized this problem:

> "Because today's action might have been worse, I concur in it -- but with one proviso: Any notion that the rule, with or without the modifications adopted here, represents a serious attempt to come to grips with network dominance of the television programming market is a myth. How much better it would have been had the Commission expended a comparable amount of its resources and talents on sober study and rational action dealing directly with the fundamental problem.
>
> "That was the Commission's responsibility in 1970. It still is."

The majority's limited and rather tentative conclusions, unsupported by factual findings, that network dominance has not increased, are flatly repudiated over and over again in the detailed study by its Economist. He finds, with a mass of supporting data, that the networks are more dominant from 8 to 11 P.M. because of the artificial scarcity of network prime-time schedules caused by PTAR -- and that the networks' powerful O & O groups control the creation of new access programs from 7:30 to 8 because of their strategic positions in the largest markets in the nation.*

In view of PTAR's frustration of its predicted goal of decreasing network dominance, the decision to continue the rule is arbitrary and capricious and contrary to the public interest. It simply ignores the economic facts of life recognized by its own economist and by other parties throughout the television industry.

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* A 167-69, 177-78, 181, 194, 201-02, 206-07, 211, 244-45.

III.

THE BAN ON FEATURE FILMS IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE PUBLIC INTEREST

PTAR originally allowed access telecasts of feature films unless they had been broadcast in a market within the prior two years. Now, the Commission -- while professing to relax the motion-picture rule (¶ 86) -- proposes a total ban of all features in access time, even though the Commission notes "[t]his total ban was not proposed in the Notice, nor was it really urged as a proposal by any of the parties. . ." (¶ 86)

The FCC has thus arbitrarily outlawed an entire category of program material simply because it happens to be shot on film and has a running time of 90 minutes or more. It has banned the medium regardless of the message. This blanket censorship of an entire form of entertainment programming is entirely unprecedented and, as discussed below, raises grave constitutional questions. Moreover, the embargo is totally arbitrary and capricious and inconsistent with the Commission's stated purpose to relax the movie restriction.

The FCC proposes to "relax" the restriction by permitting the telecast of features from 7-7:30 P.M. but banning them from 7:30-8 P.M. (¶ 86) The so-called relaxation is wholly illusory. What appears at first blush to be only a half-hour

ban of movies will in practice -- when combined with the impact of reduced network schedules under PTAR and stations' normal news schedules -- substantially curtail the opportunity of local stations to show movies during early evening and prime time hours when most people watch television.

(1) As a practical matter, stations cannot be expected to start movies at 5 P.M. because they would run into the 6-7 P.M. period typically devoted -- as noted by the Commission (¶ 24) -- to local and network news.

(2) While the FCC now purports to free-up movies for telecast in the 7-7:30 P.M. time slot, a station obviously cannot start a feature at 7 because it would run into the 7:30-8 P.M. embargo against movies.

(3) Nor, as a practical matter, will stations schedule movies at 8 P.M., after the embargo, because that would preempt the first 1-1/2 or 2 of the 3 hours of the network's prime time schedule. Indeed, it is most unlikely that stations will schedule their own movies at any time in the 8-11 time period. As shown above, PTAR has reduced station preemptions of the foreshortened network schedules to almost zero.

In summary, the new movie ban will severly discourage local stations from presenting motion pictures at any time during the evening viewing hours.

The FCC's movie bar does violence to the rationale of its Opinion. The two do not jibe. Thus, the FCC recognized

that movies are a valuable form of diverse programming (¶ 14) and expressed a desire to relax its prior restrictions:

> "There appears to be merit in the arguments, by opponents of the restrictions, that the present rule unduly restricts licensees in the selection of movies they believe desirable (whatever their origin or last telecast), and that stations should be able to present a movie fairly often during prime time in order to recover its high cost, if their judgment so indicates." (¶ 86)

Inexplicably, however, the Commission then imposes a ban which increases the very restrictions it sought to relax.

The Opinion abounds with other irreconcilable inconsistencies on this point. For example, it states at several points (¶¶ 80, 86) that affiliates under the new "relaxed" rule will be able to present feature films from 6 to 7:30 P.M. But that conclusion is flatly contradicted by the recognition elsewhere in the Opinion (¶ 24) that this time period is typically reserved for local and network news. The Commission also states:

> "Stations may, of course, preempt network time later [after 7:30 P.M.], as a number do and long have done, if they wish to present their own movies. . . ." (¶ 87)

But this is also totally unrealistic. As shown above, station preemptions have now virtually disappeared.

The final illogical conclusion in the Opinion's rationale for the movie ban is as follows:

> "We conclude that this [the total ban] is an appropriate, and indeed the best, approach to what is otherwise a difficult and rather complex problem -- how to apply such distinctions as 'made for theatre' or 'made for television', or previously shown on a network or not, or previously shown in the market within a given period or not (and if so, at what time of day they were shown). All of these distinctions were somewhat artificial at best, and served chiefly to provide a limitation on use of movies to fill 'cleared' time, which is necessary if the production of new non-network material is to be encouraged." (¶ 86, emphasis added)

But these "artificial" distinctions were created by the Commission itself. Moreover, they make no sense in terms of any rational public interest considerations. And finally, if they were rational, those distinctions are not "difficult" or "complex" to apply. For example, a theatrical movie is independently created, financed and produced to play first in theatres and later on television; whereas, a made-for-TV feature plays first on television and rarely plays in domestic theatres. The Opinion's rationale is thus totally illogical.

The movie embargo not only rests on a series of fallacious and inconsistent theories but, more importantly, will also cause grave harm to the public. Movies are an exremely popular and desirable form of television programming. But a large portion of the public misses network telecasts of even the most outstanding movies -- whether it be My Fair Lady,

Love Story, or A Man for All Seasons. When will those viewers now have an opportunity to see those films on local stations? Movies -- if purchased at all by local stations -- will be relegated to the morning, the early afternoon or very late at night, when most working people cannot see them.

The movie ban will also increase network dominance and injure independent producers -- all contrary to the goals of PTAR. Prior to the rule, independent producers could license movies to hundreds of local stations as well as to the three networks. By discouraging affiliates from preempting network time, the original rule curtailed the ability of producers to syndicate films to stations. The new total ban will seriously aggravate that problem. This will put independent producers and distributors at a decided disadvantage in dealing with potential buyers, particularly with the three networks. Thus, although PTAR was conceived to decrease network leverage over independent producers, including motion picture companies (23 FCC 2d 382, ¶ 9), the new movie ban will have the opposite effect.

The FCC has repeatedly recognized that motion picture producers are an important independent source of programming for the entire television industry and supply both stations and networks with a substantial amount of creative, varied and

popular programming. The FCC has repeatedly stressed the public-interest importance of a healthy and creative production industry. Yet the Commission's ban on movies will severely depress the syndicated licensing of features to local stations -- an important source of income for the industry.

It is particularly ironic that motion pictures should now be singled out for such arbitrary treatment by the FCC because they are ideal in terms of the original objectives of the PTAR. They are diverse, innovative and produced independently of the networks. Once again, the Commission's action is capricious and contrary to the public interest and, as discussed below, offends fundamental Constitutional principles.

IV.

THE FCC'S DECISION TO CONTINUE THE OFF-NETWORK BAN IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE PUBLIC INTEREST

The Commission's Notice of Rule Making (37 FCC 2d 900, JA 1-33) frankly admits that "it is questionable whether the [off-network] rule if literally applied would serve the public interest" (¶ 12); that the rule is a "bar on the presentation of some highly worthwhile material" (¶ 38); and that the off-network ban does not represent "the objective of the rule to lessen network control of television programming" (¶ 38). Nevertheless, the Commission now continues the off-network ban from 7:30-8 P.M. But the ban, by the Commission's own admissions, does not "serve the public interest" and bars "highly worthwhile material". Again, the Commission's action is wholly arbitrary and contrary to the public interest.

Three years of experience under PTAR reveals the highly artificial and arbitrary nature of the entire concept of the "off-network" rule. Under the rule, a station may not present a particular or discrete episode of a television series if that particular episode ever appeared on a network (despite its creation by an independent producer). On the other hand, PTAR permits -- indeed encourages -- production of new episodes of series that had appeared on the networks for many years or

are still appearing.* And access producers overwhelmingly prefer to copy those network programs which can be most easily and cheaply duplicated -- namely, game shows. Thus, the top three access shows are copies of game shows that appeared on the networks for more than a decade (To Tell the Truth, Truth or Consequences, and What's My Line).** Other access shows are merely the sixth episode of a game show currently being presented five times a week on daytime network television (Let's Make a Deal, Hollywood Squares and New Price is Right).*** The audience and quiz master just stay in the studio to grind out a sixth episode.

Thus, the rule fosters replications of these network game shows but bans the use of a particular episode of a series if it ever appeared on a television network -- no matter how outstanding or meritorious -- whether it be The Wonderful World of Disney, All In the Family, Perry Mason, Dr. Kildare, Gunsmoke, or The FBI.

Why is Lassie labelled "off-network" and thus contraband, whereas the sixth episode of the stripped network show

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* See chart supra following page 23.

** Ibid.

*** Ibid.

The New Price Is Right is viewed as not "off-network" -- as something different and superior, entitled to free access? This is arbitrary in the extreme and serves no conceivable public interest objective.

Indeed, the off-network ban highlights the manner in which the FCC has routinely made capricious programming decisions under PTAR. Since passage of the rule, the Commission has been swamped with requests for waivers of the "off-network rule" by parties seeking to run particular programs or series barred by the rule. In response to these requests, the Commission has made judgments as to quality and content -- judgments clearly forbidden by law. For example, the Commission was willing to waive the "off-network" restriction for factual nature shows (Wild Kingdom and National Geographic) but not for fictional nature programs (Lassie).* Then Chairman Burch, in his dissent in the Lassie case, pointed out the dangerous course upon which the Commission had embarked:

> "The more the Commission interprets and implements the prime time access rule, the less sense it makes.
>
> With the decision in 'Wild Kingdom' on the books, the Commission now rules that 'Lassie' is somehow a beast of a different color. The majority relies principally on the distinction that 'Lassie' is 'fictionalized entertainment' whereas 'Wild Kingdom' is a 'factual presentation' (p. 3 of

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* 33 FCC 2d 583 (Wild Kingdom); 25 RR 2d 731 (National Geographic); 35 FCC 2d 758 (Lassie).

> Commission ruling) -- and I almost hope my colleagues do not mean to be taken seriously about this. The only conceivable basis for such a distinction is that they approve of 'Wild Kingdom' and regard 'Lassie' as less worthy. In short, they are making a back-handed qualitative programming judgment which, in my view, lies wholly beyond their authority and (because it is back-handed) fails on grounds of candor as well." 35 FCC 2d at 761.

The off-network ban is particularly arbitrary because, as this Court recognized in Mt. Mansfield, independent producers generally do not recover production costs from the network run of a series but must look to subsequent syndication to stations. (442 F.2d at pages 485-6) PTAR, by curtailing a substantial portion of this market in favor of repeats of old network game shows, has frustrated the paramount goal of fostering the health of the independent production industry and stimulating investments in new and diverse programs -- investments that are discouraged in new projects of today are later foreclosed from syndication.

Whatever its original professed purpose, three years of experience demonstrates that continuation of the off-network ban is arbitrary and capricious, extremely injurious to the viewing public, and offensive to basic Constitutional precepts.

V

PTAR VIOLATES THE CONSTITUTION AND THE COMMUNICATIONS ACT

The Commission's decision to continue PTAR is, as shown above, arbitrary and capricious and violates the public interest standard which is the touchstone of FCC action. Moreover, the decision to continue PTAR -- in light of three years experience since Mt. Mansfield -- also violates the Constitution and the Communications Act.*

A. THE FIRST AMENDMENT AND THE COMMUNICATIONS ACT

The First Amendment is part of the "public interest" standard of the Communications Act. And Section 326 of the Act specifically prohibits FCC censorship.** Here, PTAR does violence to basic First Amendment principles -- principles which must now be re-applied to the rule in the light of its three-year track record.

The Paramount Right of the Public

As enunciated by the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) and recently

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* 47 U.S.C. §151 et seq.

** "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

reaffirmed in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), the government can impose limited restrictions on the programming discretion of broadcast licensees only when such restrictions will advance the more fundamental First Amendment interests of the people as a whole:

> "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . .. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." Red Lion, 395 U.S. at 390.
>
> * * *
>
> "Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted..." CBS, 412 U.S. at 110.

The mandate of the FCC is to serve the public interest by assuring "the widest possible dissemination of information from diverse and antagonistic sources" Associated Press v. U.S., 326 U.S. 1, 20 (1945).

Limitations on the Commission's Power

The Court in Red Lion expressly stated that its affirmance of the "fairness doctrine" did not constitute carte blanche ratification of future FCC actions, noting that more serious First Amendment issues involving governmental

interference in programming might arise (395 U.S. at 385, 396) The public's right must be jealously guarded and the FCC cannot be permitted to become a national program director.

In the recent CBS case, supra, the Court carefully delineated the Commission's narrow and limited role and the bounds it must not overstep.

> "[T]he Commission acts in essence as an 'overseer,' but the initial and primary responsibility for fairness, balance, and objectivity rests with the licensee. This role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." (412 U.S. at 117)

But when the "delicate balance" shifts, when the "regulators" stray from the "tightrope", when the government expands its role from "overseer" to program selector, the "First Amendment values written into . . . the Communications Act" are essentially lost.

In holding that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements, the Court in the CBS case spoke to the critical issue of improper government interference in program content:

"By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment -- the risk of an enlargement of Government control over the content of broadcast discussions of public issues. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951).

* * *

". . . The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements." (412 U.S. 126-27)

The Obligation to Revisit the Rules

Not only must the government avoid improper expansion of its role with respect to broadcast content, it must also constantly monitor and re-examine its rules in this sensitive constitutional area.

In the landmark decision in National Broadcasting Co. v. U.S., 319 U.S. 190, 225 (1943), the Supreme Court enunciated the applicable standard:

> "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

And, in approving the FCC's "fairness doctrine", the Supreme Court in Red Lion emphasized the importance of reviewing the record of actual operating experience to determine whether the rules had achieved the results predicted:

> "And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." (395 U.S. at 393)

Similarly, in American Trucking Ass'ns. Inc. v. Atchison, Topeka & Sante Fe Ry., 387 U.S. 397 (1967), the Supreme Court declared (at p. 416):

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

The Mt. Mansfield Decision

This Court in Mt. Mansfield adopted those basic Constitutional principles and recognized the need to re-examine PTAR in light of experience.

Although PTAR was an unprecedented restraint on broadcasters, this Court nevertheless found that it appeared to be a "reasonable step toward fulfillment" of the paramount public interest considerations enunciated in Red Lion because the FCC predicted that it would encourage program innovations and diversity and curtail network dominance. In rejecting the contention that the rule would not work, this Court specifically deferred to the optimistic forecasts of the FCC:

> ". . . petitioners argue that the prime time access rule cannot stand because it cannot succeed. It is true that the effect of such a change in the market on independent producers who heretofore had no access to this market is difficult to predict; indeed, the Commission itself has conceded the difficulties in this area. As one of the interested parties put it, the Commission is dealing with 'estimates and forecasts.' However it is the Commission's function to make such estimates and forecasts and the fact that there is vigorous disagreement as to the effect of the rule does not prevent the Commission from acting or require this court to reassess the probabilities." (442 F.2d at 483-84).

However, while relying on the FCC's forecasts, this Court also quoted with approval the language from Red Lion as to the need to review Commission rules and to "reconsider" their "constitutional implications" in light of actual operating experience. (442 F.2d at 479)

It is now time, we submit, for this Court to revisit "the constitutional implications" of PTAR in light of three years of operations.

- The paramount public interest in a wider choice of innovative programming has not been served; the Commission's own findings -- which no one disputes -- establish that basic fact. PTAR has generated an unparalleled uniformity and sameness in game shows, often stripped, and similar fare and led to a doubling of commercials.

- The public interest in reducing network dominance in the programming process has also not been served. PTAR has increased network dominance -- a point which the Opinion does not deny but merely ignores.

In short, the Commission's predictions and forecasts upon which this Court relied in affirming the untested rule three years ago have now been disproven by actual experience. Those predictions -- which the FCC is unwilling to repeat -- can no longer support rention of the rule. This misguided experiment in governmental interference in the programming process has inflicted grave injury on the viewing public and restricted -- rather than expanded -- the public's right to the maximum diversity of ideas and fresh program concepts. At the same time it has severely -- and, in view of its failure, unjustifiably -- restricted the traditional freedom of broadcast licensees in selecting programs.

The New Movie Ban, PTAR's Other Restrictions and Its Preferred Program Categories Raise Additional Constitutional Issues

The foregoing facts require invalidation of the basic rule as passed in 1970 under this Court's duty to re-apply Constitutional principles in light of experience. Wholly apart from that, the rule must fail because its new modifications -- the sine qua non for its continuance -- aggravate the old Constitutional problems.

Thus, the new total ban of all feature films in access time is an unprecedented administrative action with no Constitutionally permissible justification. It arbitrarily singles out a broad form of diversified entertainment programming for especially oppressive and arbitrary treatment. Communications are banned simply because they are on celluloid and have a certain general running time -- regardless of any other factor.

Such a broad restraint cannot possibly withstand scrutiny under the First Amendment. Motion pictures are a form of protected expression. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). A prior restraint, such as the present flat ban, is impermissible and presumptively contrary to the public interest. New York Times v. U.S., 403 U.S. 713, 714 (1971); Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963). See also Near v. Minnesota, 283 U.S. 697 (1931).

Moreover, as shown below, a regulation which arbitrarily bans "feature films" (and off-network programs and network programs) and encourages game shows, foreign programs and network retreads is an unreasonable discrimination which violates equal protection guarantees. Those arbitrary and discriminatory classifications, inherent in the original rule, are compounded by the provisions of the revised rule establishing broad classes of "preferred" programs.

Thus, for example, while banning feature films and off-network programs and restricting network programs, the Commission allows an exception to its new PTAR for one night a week for children's specials such as "Cinderella," "The Grinch That Stole Christmas" and "Charlie Brown" (¶¶ 77, 83); for an undefined category of so-called "public affairs" programs; and for documentaries ("any program which is non-fictional and educational or informational") (¶¶ 77, 83, 101-104). The Commission also permits an exception to PTAR when a network devotes all or substantially all of its prime-time on a particular night to a broad and unlimited category of international sports events, New Year's Day bowl games, and to "other network programming of a 'special' nature which is neither sports events nor motion pictures" (¶ 110). The so-called "specials" are not defined. The Commission specifically states that this exception would not apply to "a four-hour presentation such as 'The Ten Commandments.'" (¶ 110)

In short, this catalogue of preferred programs and the accompanying censorship of other broad program types -- all of which are inter-related and integral parts of the seamless web spun by the Commission -- place the agency in the role of a "national program director". This is totally unprecedented. There has never before been such governmental interference in First Amendment areas.

Moreover, because the preferred categories are so broad and cast in such general terms, this will inevitably invite a multiplicity of waiver requests -- the very thing the Commission states (¶ 83) it wishes to avoid in view of its past misadventures in this area.

This maze of arbitrary distinctions and program classifications, integral to the split decision to continue the rule, compounds the Constitutional problems noted above and can only lead to further governmental intrusion into Constitutionally forbidden areas:

1. What is the Constitutional justification for preferring a children's special such as "Cinderella," "The Grinch That Stole Christmas" and "Charlie Brown" and, at the same time, banning feature films dealing with these identical stories or other children's movies of the same genre?

2. What is the Constitutional justification for preferring documentaries but banning feature films which are factual documentaries (such as "The Sorrow and The Pity," "Blue Water, White Death," or "To Die in Madrid") or fictional treatments of subject matters similar to those normally dealt with in documentaries (such as "Z," "Tora, Tora, Tora," or "Patton")?

3. What is the Constitutional justification for preferring international or for that matter any other sports events but excluding dramatized biographic movies of sports heroes?

4. What is the Constitutional justification for preferring so-called "specials" which occupy all or most of prime time on a particular night but banning outstanding four-hour or three-hour motion pictures (such as "The Ten Commandments," "Bridge on the River Kwai," "My Fair Lady" or "Lawrence of Arabia")?

5. What is the Constitutional justification for allowing public affairs programs but outlawing feature films which deal with important matters of public affairs?

The Commission states that it wishes "to encourage the presentation of other kinds of network or off-network documentaries, such as those produced and discussed herein by Wolper." (¶ 101) Will the public "benefit" more from a documentary about nature and ecology such as Jacques Cousteau's

one-hour television films than from feature films like Jacques Cousteau's "World of Silence", "Born Free," or "Walkabout"? Will the viewing public "benefit" more from a Wolper documentary about slavery and problems of Black Americans than from feature films such as "The Autobiography of Miss Jane Pittman" or "Sounder"? Will the public learn more about the problems of immigrants coming to the U.S. from a documentary than from feature films such as "The Emigrants" and "The New Land"?

It is clearly not the government's province to make such decisions because "[w]hat is one man's amusement, teaches another's doctrine." (Winters v. New York, 333 U.S. 507, 510 (1948)) PTAR flouts that fundamental constitutional principle and injects the government's hand into the daily programming decisions of networks and local stations.

The Commission, recognizing that it is operating in sensitive First Amendment areas, denies that it is becoming a national program director. (¶ 83) It explains that the special categories of preferred programs are "permissive, not a requirement". (¶ 83) But the flat ban on motion pictures, the flat ban on off-network programs and the restriction on network programming 7:30-8:00 P.M. are mandatory. The so-called "permissive" classes of preferred programs can be shown at any time -- as can game shows and inexpensive foreign imports -- but the

other less preferred classes of programs (movies, off-network and network programs) do not enjoy the same freedom. An unconstitutional act of discrimination or intervention by a government agency is not rendered constitutional merely because it authorizes rather than requires a discriminatory pattern.

The Commission also seeks to side-step the serious First Amendment problems inherent in all parts of its integrated rule by concluding that its list of preferred program classes "reflects not so much a view that these kinds of material are 'worthwhile' -- although admittedly this is a factor -- as that under the present rule its presentation involves certain special problems." (¶ 83; emphasis added) Thus, the Commission here flatly admits that it is engaging in qualitative evaluations. Moreover, the so-called "special problems" cited by the Commission to justify its exception -- the late start of children's programs and the virtual disappearance of public affairs from the networks since PTAR -- are by the FCC's own admission the direct results of the rule itself.

Finally, the Commission states (¶ 84) that it makes an exception for documentaries because they are difficult to present under PTAR, and that prior off-network waivers to permit such material have involved the Commission in "evaluation of 'programming quality' with respect to individual material."

But the Commission's present modifications now formally codify the former improper evaluation practice and its vague preferred categories will generate an avalanche of waiver requests.

To repeat the observation of former Chairman Burch in the Lassie case (35 FCC2d 758, dissent): "The more the Commission interprets and implements the prime time access rule, the less sense it makes."

B. EQUAL PROTECTION UNDER THE DUE PROCESS CLAUSE

When Equal Protection issues arise in connection with "fundamental interests" like free speech, the Courts impose particularly stringent standards. The cardinal rule is governmental neutrality. When limited exceptions are sought, it must be shown that there is a compelling and overriding public need for government action and that it cannot be met by other less drastic and more precise regulations which minimize the impact on protected speech. See e.g., Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965); Morey v. Dowd, 354 U.S. 457 (1957); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951). As shown above, PTAR, in its original and recast form, creates a host of impermissible discriminations in violation of these principles.

Before even considering the possibility of continuing such discrimination, the Commission must demonstrate that it has sought and tried alternative solutions which interfere less with the public access to television.

To the extent that there is a compelling public need to increase program diversity, the Commission must seek a different approach than PTAR.

If the Commission finally wishes to discharge its public interest duty to decrease network dominance, then it must attack this problem in a direct and meaningful manner.*

If the FCC wishes to encourage stations to present more local material, programs devoted to children, public affairs shows, documentaries or programs geared to the needs of minorities or other community groups, then it should explore direct means for doing so within Constitutional bounds as part of license renewals or by other methods.

Byt why tie all of these goals to the albatross of PTAR? Why attempt to encourage such programs and reform at

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* See, for example, dissent by then Chairman Burch to original adoption of PTAR in May 1970 (23 FCC2d 411) and his separate statement in connection with the Current Report and Order; separate opinion of then Commissioner Johnson in October 1972, concurring in part and dissenting in part, in connection with current Notice of Rule Making (37 FCC2d 925); Final Report of Commission's Communications Economist of September, 1973, reproduced in Appendix, at A 164. Also compare Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 131 (1973).

the price of subjecting viewers to a mass of game shows, double commercials and a denial of their favorite network and off-network programs and a deprivation of their most popular movies?

In short, under the Due Process and Equal Protection Clauses, the FCC can deal with compelling public interest needs, but only by regulations which are direct and precisely-fashioned to deal with those needs without unnecessarily infringing protected expression. PTAR is an impermissible blunderbuss which creates unequal treatment in First Amendment areas and aggravates the very problems it was supposed to alleviate.

VI.

THE COMMISSION'S DECISION TO CONTINUE PTAR ALSO VIOLATES THE BASIC PRINCIPLES GOVERNING ACTION BY ADMINISTRATIVE AGENCIES

The courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions" (NLRB v. Brown, 380 U.S. 278, 291 (1965)); nor can "[t]he deference owed to an expert tribunal be allowed to slip into a judicial inertia" (American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965)).

Indeed, the Supreme Court earlier this month struck down FCC regulations because they were based upon improper standards. National Cable Television Ass'n, Inc. v. United States and F.C.C., 42 U.S.L.W. 4306 (March 7, 1974). The Courts have not been reluctant to invalidate other actions by the FCC. See, e.g., F.C.C. v. RCA Communications, Inc., 345 U.S. 86, 90 (1953) ("Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body."); Office of Communication of United Church of Christ v. F.C.C., 465 F.2d 519 (D.C. Cir. 1972); WAIT Radio v. F.C.C., 418 F.2d 1153 (D.C. Cir. 1969) aff'd, 459 F.2d 1203 (D.C. Cir. 1972).

The controlling principles governing judicial review of actions of administrative agencies under the Administrative Procedure Act* need no extended discussion here. The basic

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* 5 U.S.C. §§ 702-06.

rules were set forth by this Court in Scenic Hudson Preservation Conf. v. Federal Power Com'n, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). There, this Court reversed action by an administrative agency because inter alia it failed to "compile a record which is sufficient to support its decision", "ignored certain relevant factors", and "failed to make a thorough study of possible alternatives" (354 F.2d at 612). The Court also noted that the agency could not function as "an umpire blandly calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection." (354 F.2d at 620) The Court was also critical of the agency's disregard of the expert views of its "own staff" and of its substituting contrary views for which there was "no substantiation." (354 F.2d at 623)

The teachings of Scenic Hudson are particularly appropriate here. As shown above, the FCC has decided to continue a rule which, according to its own findings, has for three years frustrated the very goals it was designed to accomplish, without "a thorough study of possible alternatives" which might offer some realistic prospect of accomplishing those goals. And the Commission is perpetuating that counterproductive rule in defiance of the views of its own former General Counsel and Communications Economist (and also in disregard of an expert study by the Office of Telecommunications

Policy). Finally, the Commission, by its own admission, acted as "an umpire" to achieve a compromise between competing private interests and, in the process, ignored the public interest.

Here we have the paradox of the Commission initially passing an experimental rule based upon predictions that it would increase program diversity; now finding that it has frustrated that objective and for three years foisted repetitive programming formats on viewers; now refusing to repeat its earlier predictions that the rule is likely to lead to greater choices for viewers; but nevertheless, inexplicably, continuing the rule.

Here we have the paradox of the Commission initially passing a rule in the expectation that it would decrease network dominance; now ignoring the undisputed record, and the in-depth study of its Communications Economist, that network dominance has increased because of the rule, a fact evidenced by the switch of two networks from opposing to favoring the rule after they saw how it operated; and yet the Commission inexplicably continues what turned out to be a pro-network rule, without exploring viable alternatives directed toward alleviating the long-standing problem of network dominance which has plagued the industry, and consumed the time and energies of the Commission, for almost two decades.

We respectfully urge the Court to compare the FCC's original opinions authorizing PTAR (23 F.C.C.2d 382, and 25 F.C.C.2d 318) with its current opinion continuing the rule. They read like two different opinions by two different agencies dealing with two sets of different problems. The contradictions and inconsistencies in the two sets of opinions are unique in the annals of administrative procedure.

In short, judged by Scenic Hudson or by any other relevant precedent, the action of the Commission defies all standards of reasonable administrative action in the public interest. And, what is worse, it transgresses the most sacred guarantees of the First Amendment.

Conclusion

For all of the foregoing reasons, we respectfully request that the prime time access rule by set aside in its entirety.

Respectfully submitted,

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Dated: New York, N.Y.
March 28, 1974

Affidavit of Service by Mail

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DOROTHY A. COX, being sworn, says:

On the 28th day of March, 1974, I served the within Brief (two copies) and Appendix (one copy) upon the following attorneys at the following addresses designated by them for that purpose:

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Said service was made by depositing true copies of the attached Brief and Appendix enclosed in a postpaid air mail special delivery properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Dorothy A. Cox

Dorothy A. Cox

Sworn to before me this
28th day of March, 1974.

George P. Felleman

Notary Public

GEORGE P. FELLEMAN
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Qualified in New York County
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